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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

No. 670

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners

versus

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HERSCHEL S. GREEN and MADGE GREEN,
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versus

OSCAR L. GREEN, ROBERT A. GREEN,
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Herschel S. Green and Madge Green, by G. W. Horsley and L. H. Lenz, their attorneys, respectfully petition this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Seventh Circuit rendered in this cause on December 20, 1954.

Your Petitioners respectfully show:

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 218 Federal Reporter (2nd Series) 130. This opinion is attached to the Certified printed Transcript of the Record and is also appended to this Petition and by reference made a part hereof. The opinion in the United States District Court for the Eastern District of Illinois has not been printed in the official reporter, but is found at pages 93-108 of the Certified printed Transcript of the Record.

II.
JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit was rendered in this cause on December 20, 1954, and the petition for rehearing filed in that court by the petitioners was denied on January 20, 1955. Thereafter, on January 25, 1955, the United States Court of Appeals for the Seventh Circuit entered an order staying the issuance of the mandate for 60 days from that date and thereafter, provided this petition is filed within such 60 day period.

The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Court of Appeals for the Seventh Circuit is Section 1254 of Title 28 of the United States Code.

III.
QUESTIONS PRESENTED FOR REVIEW

The two essential questions raised by the petitioners in the Court of Appeals was whether or not the lower court

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had jurisdiction of the subject matter, first, because of prior actions pending in the State courts and second, because there was no diversity of citizenship after a proper realignment of the parties. The C.C.A. in its divided opinion refused to recognize and abide by the previous decisions of this Court on these two questions.

IV.
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes which this case involved are as follows:

A. The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, United States Code: "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree; * * *"

B. The right of the Court of Appeals to review the interlocutory order of the District Court refusing the injunction maintained under Section 1292 (1), Title 28, United States Code: "The courts of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *"

C. The plaintiffs in the District Court maintained that that court had jurisdiction to determine the cause under the following constitutional and statutory provisions respectively:

Article III, Section 2 of the Constitution of the United States:

> "The judicial power shall extend * * * to controversies * * * between citizens of different states * * *"

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Section 1332 (a) (1):

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or the value of $3000.00 exclusive of interests and costs, and is between: (1) Citizens of different States * * *"

V.
STATEMENT

James Allen Green died in Crawford County, Illinois on November 2, 1935, leaving his widow, Martha Green, and two children, Oscar L. Green and Herschel S. Green. By his will he left all of his property to his widow for life, giving her the power to sell, mortgage and dispose of the same, with the consent of Herschel S. Green, and at her death, in trust to Herschel S. Green as Trustee, with the income only to go to Herschel and Oscar and the remainder to their children, or if one left no children, to the children of the other. The James A. Green estate was administered and closed. James A. Green owned real estate, Martha Green owned other real estate, and, after the death of James, she acquired other real estate. All of the property was operated as one unit during the life of James and continuously thereafter to the present. Even Oscar Green, who operated the properties for a while prior to Herschel, operated them as a single unit. The fact that it has been a long standing custom to operate all of the property of both estates, including personal property thereon, as a single unit is undisputed.

Martha Green died April 9, 1942. Her will left all property in trust to Herschel, with the income for life to be divided between Herschel and Oscar and the remainder to their children, but by codicil she provided that if either left no children, the income for life to the widow and upon her death or remarriage to the surviving children of the other son. Herschel was named as executor, duly appointed and the estate has never been closed and is still pending in the County Court of Crawford County, Illinois.

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On July 13, 1949, Oscar L. Green filed a petition in the Circuit Court of Crawford County, Illinois, asking for an accounting of Herschel S. Green, Trustee under the will of Martha Green, deceased. In response to said petition for accounting, Herschel filed 8 reports covering the years 1942 through 1949, inclusive, which said reports were combined and showed the operation of all units, including both estates, as a single operation (Tr. 23). On June 30, 1950 the Circuit Court ordered Oscar to deliver to Herschel all papers, documents and books of account concerning BOTH THE ESTATES OF ALLEN GREEN AND MARTHA I. GREEN. He complied with this order. The Trustee then filed a report covering the period from October 1, 1949 to December 31, 1949. Thereafter, at the instance of the Plaintiff Oscar L. Green, a rule was entered on the said Herschel S. Green to file a report covering the period from January 1, 1950 to November 1, 1950. This report was filed by the Trustee and on October 20, 1951, he was given leave to amend the reports previously filed. On the same date Plaintiff filed a motion to dismiss the action, which was never presented to the Court for consideration and which the Court has never acted upon. All of the reports of the Trustee were received by the attorney for the Plaintiff and no objections to these reports were at any time filed in the Circuit Court of Crawford County. (Tr. 24-25; 75-76.)

On November 8, 1951, Oscar L. Green and his two sons filed suit in the District Court of the United States for the Eastern District of Illinois, asking that Herschel S. Green account in both the estates, of James A. Green and Martha Green. Herschel S. Green, the Trustee, was made a defendant in said complaint, together with his wife, Madge Green, who was a contingent income beneficiary under the codicil executed by Martha Green. The com-

plaint alleged that plaintiffs were citizens of the State of Texas and the defendants were citizens of the State of Illinois. The complaint set forth the usual allegations of misconduct against the Trustee. The plaintiffs later amended their complaint and, in the complaint as amended, the plaintiffs asked for an accounting, a restoration of funds allegedly used by the Trustee or lost by his improper conduct, and asked that the Trustee be removed.

Thereafter, on December 17, 1951, defendants Herschel S. Green and Madge Green moved to dismiss the complaint as amended or to stay the proceedings until the final determination of the accounting suit in the Circuit Court of Crawford County. The Court refused to dismiss the proceeding. Thereafter, the defendants filed an answer to the complaint as amended and also filed a countercomplaint for an accounting against the plaintiff Oscar L. Green in regard to the period of his management of the trust estates.

No evidence was heard on the counterclaim filed by Herschel S. Green against Oscar L. Green, but the Court did, on October 27, 1952, hold a hearing on the question of whether or not the defendant, Herschel S. Green, should be required to make an accounting. This hearing was a few days before a general election in November, in which the defendant Herschel S. Green was a candidate for the Illinois General Assembly and, to avoid unfavorable publicity the defendant Herschel S. Green resigned as Trustee. This resignation was signed by his wife, Madge Green. Even the Plaintiff admitted that Herschel resigned "in order to avoid unfavorable publicity." (Tr. 86.)

Thereafter, the Defendants filed an amended motion to dismiss, on September 10, 1953, showing that Herschel had continued to file reports in the Circuit Court of Crawford County, with the last report being filed on August 31,

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1953, and setting up that suit as a ground for dismissal of the cause of action. The motion alleged that said matter should again be called to the attention of the Court because since the filing of the original suit, by virtue of the amended complaint, Plaintiffs were asking and the Court had taken control of the res of the trust estates; said motion further asked the Court to restrain the Trustee appointed by the Court from taking any further action in this matter. On December 5, 1953, Plaintiffs filed a motion to make Alice Green, the wife of Oscar, party plaintiff in the suit because she was a contingent beneficiary under the codicil to the will of Martha Green. Defendants filed a second motion for dismissal on the ground that Alice had the same identical interest as Madge and that the parties should be realigned and upon such realignment there would be no diversity of citizenship. This petition for certiorari involves the substance of said two motions, both of which said motions were denied by the trial court and in effect denied by the Court of Appeals in its divided opinion. A reading of the two motions will better explain the substance of Defendant's grounds for the same. (Tr. 72-84; 89-93.)

The Court of Appeals affirmed the order of the District Court on December 20, 1954. That Court rejected the contention of the defendants that the defendant Madge Green should be realigned as a party plaintiff, but held that the District Court had jurisdiction based upon diversity of citizenship. The Court of Appeals further rejected the contention of the defendants that under the authority of *Princess Lida v. Thompson*, 305 U.S. 456, the suit for an accounting in the Circuit Court of Crawford County was a proceeding quasi in rem, and that the District Court had no jurisdiction to interfere with the prior, exclusive jurisdiction of that Court, or to interfere with the jurisdiction of the County Court (acting as a court of probate)

of Crawford County, wherein the estate of Martha Green is still pending and has never been closed.

VI.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioners contend that this case squarely involves the fundamental question of whether or not a District Court can assume jurisdiction of a trustee, and the res, and the management of a trust pending the determination of the same in a State Court where said matter is pending, and also whether or not a proper realignment of the parties will defeat diversity of citizenship.

A reading of the record will show that the District Court has assumed jurisdiction of the res, has appointed a successor trustee, and specifically, on November 10, 1952, the Court, in appointing such successor trustee, provided "WITH FULL POWER TO CARRY OUT THE PROVISIONS OF THE LAST WILLS AND TESTAMENTS OF THE SAID JAMES GREEN AND MARTHA GREEN", and further ordering Herschel to turn over to said trustee all of the assets in each estate (Tr. 66).

A. The Action in the State Court was an Action Quasi In Rem, and the Federal District Court Could Not Interfere With the Prior, Exclusive Jurisdiction of the State Court.

Petitioners respectfully believe that the motion to dismiss should have been allowed and the injunction granted so that the State Court could continue with its administration of the res and bring this case to an orderly conclusion. Although Herschel was forced to resign in the Federal Court, he has never resigned as Executor nor as Trustee in the State Court.

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In the case of *Princess Lida v. Thompson,* 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285, 1938, the Supreme Court granted certiorari addressed to the Supreme Court of the State of Pennsylvania. The facts of that case are that one, Fitzgerald, made an agreement setting up a trust for the benefit of his wife and children as a part of a divorce settlement between him and his wife. He later repudiated the trust and as a result, Thompson, one of the trustees, and his wife, Lida, and her sons, brought suit in the Common Pleas Court of Fayette County, Pennsylvania, seeking specific performance of the agreement. Fitzgerald, who was one of the trustees under the agreement, was removed, ordered to account, and was restrained from encumbering the trust property. The decree was later modified. The trustees then filed an account in the Common Pleas Court, which was confirmed. A second partial account was also filed in the same court. The next day, Lida and John (one of the sons) brought suit in the U.S. District Court for the Western District of Pennsylvania against the two trustees and the administrator of one deceased trustee, alleging mismanagement of trust funds and praying that the trustees be removed and all be required to account. One of the other sons, Gerald P. Fitzgerald, Jr., filed exceptions to the partial account in the Common Pleas Court. The Federal Court then refused to allow a motion to dismiss the bill and reserved the question of jurisdiction until after answers were filed. The Defendants answered, setting up the controversy as being in the exclusive jurisdiction of the state court. A rule was entered in the Common Pleas Court restraining the plaintiffs in the Federal Court from prosecuting the suit. Then, one of the plaintiffs petitioned the Federal Court for an injunction on the state court and at the same time, an appeal was made from the order of the Common Pleas Court to the Supreme Court of Pennsylvania. The trustees

then filed a third account in the Common Pleas Court, exceptions were made and some evidence was taken. The District Court enjoined the action in the state court and held a trial on the issue of jurisdiction. The Supreme Court of Pennsylvania affirmed the court's order below, in enjoining the plaintiffs from prosecuting the action in the District Court, but on the same day the District Court gave an opinion that it had jurisdiction in spite of the proceedings in the Common Pleas Court. Thus, each court had restrained the parties from proceeding in the other.

The decision of the Supreme Court was that the District Court for the Western District of Pennsylvania was without jurisdiction of the suit subsequently brought for the same relief, and that the petitioners were properly enjoined from further proceeding in that court.

The Court said:

> (Page 467) "The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. *Its proceedings are, as the court below held, quasi in rem and the jurisdiction acquired upon the filing of the trustees' account is exclusive.*"

The plaintiffs in the District Court were two of five cestuis. One of the others, Gerald P. Fitzgerald, Jr., appeared in the Common Pleas proceedings and excepted to the trustees' accounts.

> (Page 465, 466, 467) "Certainly it is therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res

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judicata in the other. On the other hand, if the two suits are in *rem, or quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other. We have said that the principle applies to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshall assets, administer trusts or liquidate estate, and in suits of a similar nature, where to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals. While it has no application to a case in a federal court based upon diversity of citizenship wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court, (At this point the Court noted Footnote 19, wherein it cited Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 619, and other cases.) (Parenthesis ours.) this is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus."

Petitioners contend that the Court of Appeals did not give any consideration in their determination to the fact that not only had the Trustee, Herschel S. Green, filed reports covering both estates, but also, that the plaintiff, Oscar L. Green, on the order of the Court, filed all of the receipts and other papers which he had, in that Court in regard to both estates. No objections were filed to any of the reports of the Trustee. Certainly, under the reasoning of the Prin-

cess Lida case, once those reports were filed jurisdiction attached and the Federal Court had no right to interfere with the prior accounting suit applicable originally to the Martha Green estate and by actions of the parties, enlarged to an accounting in relation to both estates. The only possible distinction that could be made between the Princess Lida case and the instant case is that the jurisdiction of the District Court in trust matters was set up by statute in Pennsylvania, where in Illinois the Circuit Courts are given by statute the general jurisdiction of Courts of Chancery, which Courts exercise the power of trusts as a part of their inherent power as a Court of Chancery. *White v. Macqueen,* 360 Ill. 236, 195 N. E. 832; *Maguire v. City of Macomb,* 293 Ill. 441, 127 N. E. 682; *Johnson v. Sarver,* 350 Ill. App. 565, 113 N. E. 2d 578. Petitioners therefore contend that the Princess Lida case is controlling and precludes jurisdiction on the part of the Federal courts in this case.

Petitioners further contend that under the law of Illinois, which should determine this case, after the defendant, Herschel S. Green, filed his accounts in that cause without an order of Court, but in answer to the complaint filed by the plaintiff, that suit could not be dismissed by the plaintiff and the defendant had the right to have this accounting matter determined in that Court.

In the case of *Judson et al. v. First Trust and Savings Bank, et al.,* 238 Ill. App. 531 (1925) (certiorari denied by the Ill. Supreme Court) one Fred I. Judson filed a bill of complaint to construe a will and codicil, to remove a trustee and for an accounting. Juliet Jones, by her last will and testament set up a trust for the plaintiff with the First Trust and Savings Bank of Springfield as a general trustee and one Ayers as supervising trustee. One McCullough succeeded Ayers as trustee. The bill charged

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that McCullough paid out a large portion of income of this trust to his own use. The Bank filed an answer as did McCullough. The latter, in his answer denied any misappropriation of money, gave a detailed account as to expenditures of money, etc. The matter was referred to the master in chancery to take evidence and report. A guardian ad litem was appointed for Judson. Fred I. Judson then filed the petition to set aside the order appointing a guardian ad litem and asked that the First Trust and Savings Bank be ordered to pay money into the court for his use pending the termination of the suit. This petition was also referred to the master. A partial hearing was held and testimony was heard on the issues including that of the accounting. Then on motion of Fred I. Judson and his guardian, without notice to the defendants, the Court dismissed the suit at the complainant's cost. The Appellate Court reversed the decree of dismissal and ordered that the case be redocketed and proceed. The only questions raised were whether or not the Defendant in error had the right to dismiss his bill of complaint based upon an accounting; and the propriety of the assessment of costs. The Court in holding that the suit could not be dismissed said on page 538:

> "Defendant in error contends that the right to dismiss a bill is absolute in all cases where there is no cross-bill filed. There seems to be an exception to this rule. In a case where an accounting is the basis of the action, a defendant may have affirmative relief upon the account without filing a cross-bill, and the action is construed as if each was a party in the bill against the other (citations omitted). Whenever there is a decree to account *or the pleadings by admissions make an accounting necessary the defendant may have the affirmative relief upon the account upon answer without cross-bill filed.*" (Italics ours.)

The Court, after noting that the plaintiff in error did not in his answer pray for an accounting, further stated:

> "*Plaintiff in error, by his answer, admitted such facts of the bill of complaint that made an accounting necessary.* The answer denied the misappropriation of any of the funds or income, and specifically averred how the funds had been expended and plaintiff in error averred that in addition thereto he had advanced large sums of money of his own for the care and support of defendant in error. Affirmative relief to the defendant upon answer in such a case is not based upon the prayer in the answer but upon the prayer in complainant's bill of complaint, by which complainant impliedly obligates himself that in praying for equity he will do equity." (Italics ours.)

The important point about the case is that the court absolutely refused to dismiss the bill for accounting because from the face of the complaint and answer thereto, it was apparent that an accounting was necessary. The Defendants maintain that the Plaintiff Oscar L. Green did not have a right to dismiss his suit in the circuit court of Crawford County. The Plaintiffs asked for an accounting in the state court and in response to their petition the Defendant, Herschel S. Green, filed his reports as his responsive pleadings in the case. In that state of the pleadings where it appeared on the face of the reports that the trustee had used a great deal of his own funds in the trust administration, plaintiffs were not free to dismiss their suit at that stage of the proceedings.

This is the only case which has considered this question, has not been overruled and must be accepted as the law of the State of Illinois.

The case of *West v. First Fond Du Lac National Bank*, 31 Fed. Supp. 169, District Court, E. D. Wisconsin, 1940, involved a will of W. A. West which was admitted to pro-

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bate in the County Court of Walworth County, Wisconsin. An order was entered declaring the estate settled and the defendants were appointed trustees and were still acting as trustees of the testamentary trust set up in the will at the time of this suit. The complaint filed in the Federal Court alleged that the defendants had engaged in speculative activities, asked for an accounting and removal of these trustees and the appointment of new trustees. A motion to dismiss the complaint was allowed. The court relied to a great extent on the case of *In Re Gray's Estate*, 66 Fed. 2d 367, which is a case prior to the Princess Lida case, and in relation to the latter case the Court said at p. 171:

> "There is no dispute as to the rights of the two children of Walter A. West, Jr. to participate in the trust fund. If that right were denied, undoubtedly this court would have jurisdiction to make a determination."

The children of Walter A. West, Jr. were the plaintiffs in the suit in the West case, brought by them through their mother who was their guardian, as they succeeded to their father's interest, who was the beneficiary under the trust prior to his death.

The important distinction which this case makes interpreting the Princess Lida case is that there was no dispute as to the rights of the children to participate in the trust res. In the instant case no one has asked for a construction of the will of Martha I. Green or anyone else, and there is no question that the plaintiff in the state court, Oscar L. Green, and in the Federal Court, is entitled under the will to participate equally with Herschel S. Green, the other beneficiary. No one has denied his right to participate. The questions presented are as to the proper amount to be accounted for by the trustee and whether or not he should be allowed certain compensation for services to

the trust throughout his administration. Merely because there is a dispute as to the proper amount that is in the trust estate or should be in the trust estate does not mean that there is a dispute as to the rights of anyone to participate in that estate.

In the case of In Re Gray's Estate (supra) relied upon in the West case, a case decided by the Court of Appeals for the Seventh Circuit, there was involved the following facts. Gray's estate had been probated in Vanderburgh County, Indiana. A suit was brought in the state court for an accounting of the trust estate and for the removal of the testamentary trustees. Upon the motion of the trustees, who were residents of California, the case was removed to the United States District Court of Indiana upon the ground of diversity of citizenship. The District Court accepted the resignation of the trustees, ordered an accounting and appointed new trustees. The estate of Gray had been closed in 1905 and the property turned over to the trustees. No bond was ordered or given and no inventory or reports were ever filed. The first proceeding concerning the trust was the suit for accounting in 1922. After the new trustees were appointed by the Federal Court they filed a petition asking for instructions as to the disposition of certain funds and income. The Court of Appeals, on appeal, held that the appellant was correct in the contention that the District Court was without jurisdiction in issuing instructions to the co-trustees, and that it had no jurisdiction to order the general accounting in the first place.

The Court said, on page 370:

> "We think it is quite clear, therefore, that at the time the estate was finally settled and the property turned over to the trustees, the state court had jurisdiction of the trust. It should have required a bond

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from the trustees and reports of the administration from time to time, and its failure to do so constitutes negligence of the grossest sort; but that fact did not annul its jurisdiction, nor did it constitute a basis for federal jurisdiction. The trustees were at least acting in a de facto capacity and as such they were under the jurisdiction of, and were responsible to the Vanderburgh Probate Court. While that court was negligent in failing to act, yet it never refused to act and no person interested in the trust ever requested it to act until Mrs. Gray and her daughter filed their petition for an accounting and to remove the trustees. Thereupon it exercised its jurisdiction and issued a summons to the trustees requiring them to show cause why the petition should not be granted. In response to that summons the trustees appeared, raised no question as to that court's jurisdiction, but on the contrary, recognized it by filing a petition to have the cause transferred to the Federal Court, which petition was granted. The only issues presented by the petition of Mrs. Gray and her daughter were for a division of the money then on hand, for a general accounting of the trust funds and to remove the trustees, and, upon removal of the cause from the Probate Court, the Federal Court granted the petition except that it made no finding of any amount due the petitioners. *We think the Federal Court exceeded its authority in ordering a general accounting because the issue raised by the petition was not an independent, separate action in personam.*" (Italics ours.)

The Court went on to say that the Federal Court had no power to discharge the trustees or to accept their resignation, to appoint successors or to administer the trust, for these matters were within the exclusive jurisdiction of the state court.

Another case which involved facts similar to the instant case and in which the court interpreted the Princess Lida case was *Swanson v. Bates,* 170 Fed. 2d 648, CCA 10th

1948. That was an action to remove one, Bates, as trustee of a testamentary trust created by the will of A. S. Cook, for an accounting by said trustee and a construction of the will. The will had been admitted to probate in the County Court of Muskogee County, Oklahoma. The original trustee was removed and Bates appointed by the court. The assets of the estate were turned over to Bates by the administrator with the will annexed on October 6, 1942 and subsequently, Bates filed three annual reports which were approved. There was a protest to the fourth annual report filed by the trustee, which was continued from time to time until July 23, 1947. At that time a further continuance was secured by the plaintiff to September 17, 1947. On July 24th, however, plaintiff Swanson commenced the instant action in Federal Court. A hearing was then had in the state court and the matter was taken under advisement, and no decision had been made at the time a judgment was entered in this case. Bates filed a motion to dismiss on the ground that the District Court of Muskogee County (the state court) had exclusive jurisdiction of the subject matter. The motion was sustained and an appeal followed. The Court of Appeals affirmed the judgment in the lower court and said on page 651:

> "Upon the filing of the fourth annual report and the applications filed in connection therewith, the jurisdiction of the District Court of Muskogee County attached. These proceedings were *quasi in rem*, and, so long as they pended, they gave to the state court exclusive jurisdiction over the trust estate, and the court below was without jurisdiction to grant the relief prayed for in the instant action." (Italics ours.)

The Court bases its decision entirely on the case of Princess Lida v. Thompson (supra).

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A suggestion that runs very evident in the opinion of the Court of Appeals in this case is that the Court felt that the defendants were estopped to raise the question of jurisdiction or had waived it. It must be remembered that they filed no answer or counter-complaint until their motion to dismiss the cause was denied by the District Court. Furthermore, the resignation of the trustee and the signing of that resignation by Madge Green, the other defendant, was not done prior to the time the Court refused to dismiss the suit for lack of jurisdiction. Regardless of the proceedings in the District Court, it is fundamental that the question of jurisdiction cannot be waived by the parties. This Court made that clear in the case of *Mitchell v. Maurer*, 293 U. S. 237, 55 S. Ct. 162, 79 L. Ed. 338, at page 244 of the United States Reports, where the Court said:

> "Unlike an objection to venue lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties."

The Court of Appeals for the Seventh Circuit has clearly followed the Mitchell case in the case of *Page v. Wright*, 116 F. 2d 449, *Appeal Dismissed*, 312 U. S. 710, where that Court stated, on page 453:

> "From the authorities referred to the conclusion seems inescapable that the duty evolves on the court 'at any time the jurisdictional question is presented to proceed no further until that question is determined.' It cannot be conferred by agreement, consent or collusion of the parties, whether contained in the pleadings or otherwise, and a party cannot be precluded from raising the question by any form of laches, waiver or estoppel; so in the instant case, if the parties jointly or singly had consented or agreed to jurisdiction, it would have been of no avail in face of the fact that the question was forcefully and directly called to the attention of the court. The answer of the defendant conceding jurisdiction amounted to no more than con-

sent and as seen, jurisdiction cannot be thus conferred irrespective of whether the consent was the result of an honest mistake or otherwise.

"In view of the importance of the involved question, we think we should not conclude without some further discussion of plaintiff's position and the authorities relied upon in support thereof. Generally we think they are distinguishable although there are some which support the proposition that a jurisdictional attack not timely made is waived. (Citations omitted.) These are all District Court cases and we believe are hopelessly in the minority."

The Court of Appeals blows hot and cold in its opinion on the question of the jurisdiction of the res, which contends that Oscar filed the suit in Crawford County only for an accounting in the Martha Green estate and that Herschel enlarged it by the reports that he filed. The Court completely ignores the undisputed record that since the properties had all been operated as one unit it was impossible to file separate reports, a fact with which Oscar must have agreed because for over 8 years he did not object to such combined reports. The Court further ignores the order of the Circuit Court that Oscar turn over to Herschel all papers in connection with both estates so that he could render such accounts.

Without unduly lengthening this petition, we call this Court's attention specifically to Point 6 of the opinion of the Court of Appeals, on pages 16 and 17. It seems to us to be rather far fetched for that Court to say that it is not necessary for it to decide whether or not the proceeding in the District Court is a proceeding in rem or in personam. It is so obvious that under the law of Illinois, once the Circuit Court takes jurisdiction in a trust matter it has jurisdiction of the parties, the subject matter, and all other matters incident thereto. Can it then be said that the Federal

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Courts are now to establish a new doctrine by saying that a proceeding in personam can be started, giving the Court jurisdiction, and then changing that proceeding to one in rem by having the Court specifically appoint a Trustee, order the old Trustee to turn over the property, and thereby accomplish what this Court has said cannot be done?

The Petitioners contend that the decision of the Court of Appeals for the Seventh Circuit is squarely in conflict with the decisions of this Court heretofore mentioned, and that this Court should grant this petition.

B. **Upon A Proper Realignment Of The Parties There Is No Diversity Of Citizenship And Hence The District Court Did Not Have Jurisdiction.**

This Court made it amply clear in *Indianapolis, et al v. Chase National Bank, Trustee, et al,* 314 U.S. 63, at page 74, that the statute conferring diversity of jurisdiction upon the District Courts must be strictly construed. This Court also gave its reason for this doctrine, that the Federal Courts must be free to transact essential Federal business without being burdened with matters which should more properly be reserved to the States. No one from the time of the beginning of this case has given a valid reason why this matter could not be determined in the Circuit Court of Crawford County, Illinois. The petitioners challenge the respondents to give one valid reason why it cannot be equitably handled in that Court.

Petitioners realize that this Court is concerned, not only with the proper disposition of a case on its merits, but also with whether the case justified this Court's attention. The petitioners realize that this Court is concerned where there is a conflict among the circuit courts concerning important Federal questions. Petitioners will show that there is this conflict among the Courts of Appeal in this case and in fact

will show that there is a conflict within the Court of Appeals for the Seventh Circuit itself.

Petitioners have attached as an appendix to their Petition the opinion of the Court of Appeals for the Seventh Circuit. The Court's opinion was written by Judge Schnackenberg and a concurring opinion was written by Circuit Judge Major, who was joined therein by Chief Justice Duffy. It is obvious from a reading of the opinion that the views of the Judges, as expressed in these two opinions, are diametrically opposed in regard to the Court's disposition of the question of diversity of citizenship. Judge Schnackenberg made this imminently clear when he stated:

> "5. In my opinion the District Court never had jurisdiction to enter any order in this case except an order dismissing the case for want of jurisdiction at plaintiffs' costs, and it should be remanded to the District Court for that sole purpose.
>
> "However, my two colleagues disagree with me in my conclusion as to a lack of diversity of citizenship and my views thereon are not the views of the court."

The Court was split in its thinking on many of the questions necessary to determine this question of diversity of citizenship. This Court stated, in the case of *City of Indianapolis, et al v. Chase National Bank, Trustee, et al,* 314 U.S. 63, p. 69:

> "To sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor,* 222 U.S. 32, 36, 'substantial,' *Niles-Bement-Pond Co. v. Iron Moulders Union,* 254 U.S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss,* 3 Cranch 267."

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It is also fundamental that the Federal courts will only consider indispensable parties in determining whether or not there is diversity of citizenship. Petitioners maintain throughout that Madge Green was an indispensable party and should be realigned in the suit as a party plaintiff. The Court of Appeals was split in its opinion on many of the aspects of this question. Judge Schnackenberg, without directly so stating, quoted the Illinois cases in arriving at his conclusion, that Madge Green, as a contingent beneficiary, was an indispensable party.

Under the law of Illinois all of the life income beneficiaries and remaindermen of a trust are indispensable parties in a proceeding for accounting and removal of the trustee. *Butler v. Butler,* 164 Ill. 171, 45 N. E. 426; *Thurston v. Weed,* 242 Ill. App. 495; *Pease v. Kendall, et al,* 391 Ill. 193, 63 N. E. 2d 2; *Mason v. Bloomington Library Assn.,* 237 Ill. 442, 86 N. E. 1044.

In proceedings involving trust estates but not involving a suit for an accounting against a trustee, or for a removal of the trustee, the Illinois courts have consistently held that all the beneficiaries of a trust are necessary parties, which means indispensable parties in the language of the Federal cases. *Ill. Nat. Bank of Springfield v. Gwinn,* 390 Ill. 345, 61 N. E. 2d 249; *People's Bank & Trust Co. of Rockford v. Gregory,* 347 Ill. 397, 179 N. E. 856.

As illustrative of the language of the Illinois cases, the Supreme Court said, in the case of Butler v. Butler, supra, on page 427:

> "Said wife and children (being cestuis que trustent) (parenthesis ours) not being parties, the ultimate mandate was invalid as to them, and gave to the trustee appointed no authority to make any contract or do any act that would be binding upon their reversionary rights and interests."

There has never been any question under the Illinois law but that all beneficiaries of a trust are necessary and indispensable parties in actions concerning the trust property. As Judge Schnackenberg pointed out, this doctrine was set forth in a case decided by the Court of Appeals, being, *In Re National Realty Trust,* 167 F. 2d 440, at 443, where the Court said:

> "A more serious question is whether the court could exercise such power without notice to the certificate holders and without according them an opportunity to be heard. It is the generally established rule in Illinois, *and we think elsewhere,* that in all actions concerning trust property the beneficiaries are necessary parties. *Illinois National Bank of Springfield v. Gwinn,* 390 Ill. 345, 61 N. E. 2d 249, 159 A.L.R. 468; *People's Bank & Trust Co. of Rockford v. Gregory,* 347 Ill. 397, 398, 399, 179 N. E. 856; *Martin v. Frank,* 259 Ill. App. 417, 424."

Judge Major, in the concurring opinion, however, stated that in the judgment of Chief Justice Duffy and himself, Madge Green was not an indispensable party, and at any rate the indispensability of parties must be determined by Federal and not State rules. It would certainly seem that where the trust property, which is mainly real property, is located in Illinois and where the Trustee resides in Illinois, there is ample reason for holding that this question should be determined by the law of the State of Illinois in matters concerning the administration of the trust.

Judge Schnackenberg, in his opinion, believed that Madge Green should be realigned as a party plaintiff, although he made it clear that this was not the opinion of the Court. Judge Major felt that she should not be realigned as a party plaintiff because of what he felt was a hostility on her part to the suit of the plaintiffs. It is evident that this question cannot be determined without a complete consideration of the interest of Madge Green.

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To begin with, a fact which greatly impressed Judge Duffy and Judge Major, she is the wife of the defendant Trustee, Herschel S. Green. It would seem to the petitioners that a more important consideration is her financial and property interest in the controversy. The suit in the Federal Court was essentially a suit for an accounting in regard to both the Martha Green estate and the James A. Green estate. The plaintiff sought the removal of the Trustee, Herschel S. Green, in regard to the James A. Green estate, and asked for a restoration of funds in regard to both estates. It is true, her interest arises under the codicil of Martha Green, whereby she was a contingent, life income beneficiary for her lifetime or until she remarried, in the event her husband, Herschel S. Green died without leaving any children surviving him. Alice Green, who was made a party plaintiff on her motion, is also such a contingent, income beneficiary, although Oscar L. Green, her husband, has at the present time two living children. It is evident that Madge Green would benefit the same as Alice Green in the event that the Trustee were ordered to restore funds to the trust res. In such a case, if her interest became vested, the income payable to her might be increased. Judge Major and Chief Justice Duffy took the position that from the pleadings it was apparent that Madge Green was hostile to the plaintiff and so she was properly a defendant. She was brought in as a party defendant by the plaintiffs in the first place on the allegations in the complaint that she and the other plaintiffs were the only living successive heirs, beneficiaries and remaindermen under the terms of the trusts of Martha Green and James A. Green. On their representation she was joined in the suit for this reason and this reason only. (Tr. 7.) This is further emphasized by the answer to the countercomplaint wherein the defendants questioned, in paragraph 8, the failure to join Alice Green, the wife of Oscar L. Green, who was alive and, ac-

cording to the defendants, had as much interest under the trust estate as the defendant Madge Green. In the plaintiffs' reply to the answer (Tr. 48), the plaintiffs denied that Alice Green had the same interest as the defendant Madge Green, inasmuch as Oscar L. Green had two children living, whereas Herschel S. Green was without lawful issue. With all of the ample opportunity in the pleadings the plaintiffs never at any time linked Madge Green with any alleged misconduct on the part of the Trustee. It is true that she joined Herschel S. Green, the other defendant in his answer, denying the charges of misconduct, but it is further true that she joined Herschel S. Green in a countercomplaint against Oscar L. Green. This countercomplaint (Tr. 38-45), among other things, asked for an accounting against Oscar L. Green. No evidence was ever heard on this countercomplaint, but it is clear that any relief recovered against Oscar L. Green would necessarily have been for the benefit of all of the beneficiaries. Likewise, this would be true if the Trustee were obliged to account.

The difficulty which the Court of Appeals had in determining this case is interpreting what this Court meant when it stated in *Venner v. Great Northern Railway Company,* 209 U.S. 24, 31, that parties should be realigned—

> "on the side where their interest in and attitude to the controversy really places them."

Petitioners maintain that the intangible question of a person's feeling toward a suit has never been a determining factor in the cases decided by this Court. For instance, Judge Major, in his opinion, cited three cases decided by this Court. The first case was *Venner v. Great Northern Railway Company,* 209 U.S. 24. This was a suit by a stockholder against a corporation and other defendants, charging joint fraudulent conduct on the part of the cor-

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poration and other defendants. The Court indicated in its opinion, on page 32, that both defendants were alleged to have engaged in the same, illegal and fraudulent conduct, and the injuries to the plaintiff were alleged to have been caused by their joint action. The plaintiff's controversy was with both and the Court refused to realign the corporation as a party plaintiff. This fact is, of course, absent in the instant case. In the second case of *Hamer* v. *N. Y. Railways Co.*, 244 U.S. 266, there was a suit by certain bondholders under a mortgage in the form of a deed in trust on a guaranty agreement by the defendant. They demanded that the Trustee file suit, but he refused to do so, although he filed an answer joining in the prayer for relief asked by the plaintiffs. The Court stated, on page 274:

> "It is not contended that this refusal to sue makes the trust company an adversary to be classed for purposes of jurisdiction with the real defendants—as in those cases where the refusal to sue was part of a fraudulent participation in the wrongdoing and where the trustee or corporation in effect ranged itself in opposition to the relief sought."

The Court cited the Venner case and also the case of *Doctor v. Harrington*, 196 U.S. 579. Both cases involved actions by stockholders wherein the corporation or directors joined as defendants were alleged to be involved in the same fraudulent misconduct and therefore, were proper parties defendant.

The third case cited by Judge Major in his concurring opinion was that of *Sutton v. English*, 246 U.S. 199. In that case Cora D. Spencer was properly a party defendant and should not have been realigned as a party plaintiff because the plaintiffs, as one of their objections, were trying to contest a provision of a will which gave all of the residue of the testator's property to the said Cora D. Spencer.

Certainly, her interests were adverse to those of the plaintiffs, who wished to set that provision aside.

Petitioners contend the true meaning of the cases is that where there has been a refusal to sue on the part of an indispensable party, that party must still be realigned as a plaintiff where there is no other showing of similarity of interests with that of the other defendants. Petitioners believe that this is the holding of this Court in *Hamer v. N. Y. Railways Co.*, 244 U.S. 266, 37 S. Ct. 511. This is also the holding of the Federal courts in the cases of *Grant County Deposit Bank v. McCampbell*, 194 F. 2d 469, CCA 6th; *Menefee v. Frost*, 123 F. 633; *Davis, et al v. St. Louis Southwest Ern. Ry. Co.*, 99 F. Supp. 751, *Western District of Louisiana, Shreveport Division; Backer v. Levy*, 82 F. 2d 270 CCA 2d.

The Petitioners call the attention of the Court to the statement of this Court in *City of Indianapolis, et al v. Chase National Bank, Trustee, et al.*, 314 U.S. 63, page 69, where the Court stated:

> "Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson v. Columbia Trust Co.*, supra, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' *Eastern Tennessee V. & G. R. v. Grayson*, 119 U.S. 240, 244, and the 'primary and controlling matter in dispute' *Merchants Cotton Press Co. v. Insurance Co.*, 151 U.S. 368, 385."

The City of Indianapolis case is further significant in that this Court found in that case that there was a lack of diversity of citizenship after this Court had made a realignment of the parties. This Court decided the jurisdictional question, even though the case had previously been before it and certiorari had been denied.

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Petitioners consistently maintained that the defendant, Madge Green, was an indispensable party to this proceeding and it is fundamental that she must be joined as a party, even though this results in the Court's losing jurisdiction based on diversity of citizenship. *Baltimore O. R.R. v. Parkersburg,* 268 U.S. 35, 45 S. Ct. 382; *Kentucky Natural Gas Corp. v. Duggins,* 165 F. 2d 1011, CCA 6th. Petitioners contend that Madge Green is an indispensable party and must be realigned as a plaintiff and when this is done it is apparent, under the decisions of this Court, that there is no diversity of citizenship in this case.

The conflict concerning all of these phases of this question of diversity of citizenship is reflected, not only in this case as it was decided in the Court of Appeals, but this conflict is apparent in the other Courts of Appeal.

1. There is a conflict between the courts of appeal on the question of whether or not the substantive law of the State or Federal rules govern in determining who are indispensable parties for purposes of diversity of citizenship.

In cases involving an action for an accounting by a trustee the following cases have held that for purposes of diversity of citizenship the law of the State controlled, and not the Federal law. *Baird v. People's Bank & Trust Co.,* 120 F. 2d 1001, 136 A.L.R. 693, CCA 3rd, 1941; *Baker v. Dale,* 123 F. Supp. 364, U.S. - W.D. Mo. - Southwestern Division, 1954.

In an action for an accounting by the trustee, the Court of Appeals for the Seventh Circuit, in *De Korwin v. First National Bank of Chicago, et al.,* 156 F. 2d 858, 860, held that the question of indispensability of parties should be determined by Federal rules.

Other cases where the Federal Courts have held that the State law governs in determining indispensability of parties for jurisdictional purposes are: *Thomas v. Butler,* 136 F. 2d 644, 8th Cir., Cert. Den., 320 U.S. 761; *Kroese v. General Castings Corp.,* 179 F. 2d 761, CCA 3rd, Cert. Den., 339 U.S. 983; *Dunham v. Robertson,* 198 F. 2d 316, CCA 10th; *Whittemore v. Continental Milk,* 98 F. Supp. 387, Dist. of Maine, Southern Division. The subject matter of these suits did not involve an accounting by a trustee.

There are also several cases not involving an accounting or the removal of a trustee, from the Federal Courts, wherein those courts have held that the Federal rules govern and not the State law, in determining the indispensability of parties for jurisdictional purposes. *Cowling v. Deep Vein Coal Co., Inc.,* 183 F. 2d 652, 655, CCA 7th; *Chicago M. St. P. & P. R. Co. v. Adams County,* 72 F. 2d 816, CCA 9th.

There are other cases on both sides of the fence which make it apparent that this matter should be decided by this Court.

3. There is a marked conflict in the Federal courts as to whether or not all of the beneficiaries of a trust are indispensable parties in a proceeding for an accounting by or removal of a trustee. The following cases involved actions for accounting in which Federal courts, without reference to State law, held that both, life income beneficiaries and remaindermen, were indispensable parties to the suits. *Baird v. People's Bank & Trust Co.,* 120 F. 2d 1001, CCA 3rd; *Franz v. Buder,* 11 F. 2d 854, CCA 8th; *Crutcher v. Joyce,* 134 F. 2d 809, CCA 10th; *Talbutt v. Security Trust Co.,* 22 F. Supp. 241, Dist. Crt. Eastern Dist. Kentucky; *Baker v. Dale,* 123 F. Supp. 364, Dist. Crt. Western Dist. Mo., Southwestern Division.

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In one case the Federal Court held that it was not necessary that all beneficiaries were not indispensable parties in an action to remove a trustee. *Wesson et al v. Crain*, 165 F. 2d 6, CCA 8th. In a suit for an accounting against the trustee the Court of Appeals for the Seventh Circuit has held that all of the beneficiaries were not indispensable parties. *DeKorwin v. First Nat. Bank of Chicago*, 156 F. 2d 858, CCA 7th, Cert. Den., 329 U.S. 795. In a suit to declare a defendant a trustee of certain property the Court of Appeals for the Ninth Circuit held that all of the beneficiaries were not indispensable parties to the suit. *Sadler v. Sadler*, 167 F. 2d 1.

It is thus apparent that even though this Court would decide that the Federal law should govern in determining who are indispensable parties, there remains a conflict to be resolved, because the Federal courts which have applied the Federal law are also in conflict.

Under the tests as set forth by this Court in *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158, all the beneficiaries are necessary parties in this trust proceeding. The beneficiaries are parties whose interests cannot be separated and a final determination of the controversy in their absence would not be consistent with equity and good conscience.

This was certainly the test followed by the Court of Appeals in the Baird case, where the Court held that all trust beneficiaries, both, life income and remainder beneficiaries, were indispensable parties. That Court said, at page 1003:

> "For an absent party to be in the third class, that is, indispensable, he must of course have a direct interest in the litigation. If this interest is such that it cannot be separated from that of the parties to

the suit; if the court cannot render justice between the parties in his absence, if the decree will have an injurious effect upon his interest; or if the final determination of the controversy in his absence will be inconsistent with equity and good conscience, he is an indispensable party. *State of Washington v. United States*, 9 Cir., 87 F. 2d 421. In our opnion the interest of the remaindermen is direct, distinct and nonseverable.

"The portion of the complaint with which we are concerned relates to the administration by the trustees of the corpus of the trust. The relief sought is that certain specific investments, alleged to have been illegally made, be replaced with cash. The interest of the remaindermen in the corpus and in the specific investments is just as direct as that of the life tenants. *Talbutt v. Security Trust Co.*, D.C., 22 F. Supp. 241; *Franz v. Buder*, 8 Cir., 11 F. ed 854. Since it is a succeeding interest it is not severable as an undivided present interest might be. It is obviously impossible to make a complete physical division of a trust fund between life tenants and remaindermen. But both are entitled to compel proper action with respect to the securities comprising the corpus of the trust. If they are permitted to resort to different courts for such relief inconsistent orders with respect to the same securities might well make orderly administration of the trust impossible.

"It necessarily follows that the presence of the remaindermen is indispensable in an action by life tenants relating to the corpus of the trust fund."

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CONCLUSION

Wherefore, petitioners Madge Green and Herschel S. Green respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Seventh Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the judgment of the Court of Appeals for the Seventh Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 22nd day of March, A.D., 1955.

Respectfully submitted,

HERSCHEL S. GREEN and MADGE GREEN, *Petitioners*

By G. W. Horsley and L. H. Lenz
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Their Attorneys.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT RENDERED DECEMBER 20, 1954

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Defendants appeal from an order entered by the District Court on January 26, 1954.

On November 2, 1935, James A. Green, the father of Oscar L. Green and Herschel S. Green, died, leaving a will wherein he left all of his estate to his wife, Martha Green, for her life with power to sell or dispose of the same as she thought best, provided she secured the consent of the trustee therein named, Herschel S. Green. All of the residue of his estate, which remained at the death of his wife Martha, was bequeathed to Herschel in trust. The income of this trust was to be paid in equal shares to Oscar and Herschel at such times as the trustee might think best for the estate. In the event that either son died, his portion of the income was to be paid to his children, if any, and upon the death of both of the sons, the estate was to be divided equally between the children. Herschel was appointed both executor and trustee under the terms of this will. The will was probated in the County Court of Crawford County, Illinois, and on May 22, 1939, the estate of James A. Green was closed and the executor discharged. At the time of his death testator owned certain farms and his wife Martha likewise owned farm land.

On April 9, 1942, Martha Green, died, leaving a will and a codicil, which were duly probated in the County Court of Crawford County, Illinois. The will of Martha was identi-

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cal with that of her husband James, in that it provided that James should have a life estate in all of her properties, with the residue remaining on the death of James left to Herschel in trust, with provisions similar to those contained in the will of her husband. Her codicil made one change, however, in that upon the death of either Herschel or Oscar without any children surviving, his widow was given a life estate in the income of the trust until she died or remarried. Herschel was appointed both executor and the trustee under the will and codicil of Martha. Letters were issued to Herschel by the County Court of Crawford County on July 9, 1942. This estate has not been closed and he is still the executor.

After the death of James, Oscar continued to operate all of the farm properties, until about September 15, 1936, when Herschel took over their operation. On February 23, 1938, Herschel entered into an agreement with his mother Martha for the operation of all of these farm properties as one unit and thereupon continued to so operate them. After her death he continued such operation.

On July 13, 1949, Oscar filed a petition in the Circuit Court of Crawford County, Illinois, seeking an order requiring Herschel to file an accounting of all his acts and doings as trustee under the will of Martha. This petition is entitled "In the Matter of Herschel S. Green, Trustee under the Will of Martha Green, Deceased." It alleges the death of Martha Green, unmarried widow of James A. Green, leaving a last will, with a codicil thereto attached, appointing defendant Herschel S. Green as trustee under a certain trust therein created; the admission of the will and codicil to probate in the County Court of Crawford County and the qualification and assumption of duties by Herschel as trustee thereunder; that Oscar is a beneficiary of the trust created by said will and codicil; that thereunder the

trustee was authorized and directed to take charge of, manage, operate and control all personal property and all farm lands, all of which was part of the trust estate, and to receive all income therefrom and from such income to pay all necessary expenses, taxes, and other items of upkeep and after the payment thereof the trustee of said trust estate was directed to divide the net balance remaining, in equal parts, between the petitioner and the said Herschel S. Green at such time as the said Herschel S. Green, trustee thought best for said estate; that all of the trust estate consists of real and personal property located within the State of Illinois.

Petition also charged that the trustee herein in the administration of his trust, and in the performance of his duties as such trustee, has received various amounts of money as income, profits, and rents of such trust estate; that petitioner had repeatedly demanded an accounting from the trustee, but trustee refused to make an accounting of his acts and doings. No parties to the suit are named except Oscar and Herschel. Summons was served on Herschel, the trustee, on July 19, 1949, and beginning on September 30, 1949 and ending August 31, 1953, he filed in said court a series of reports of his acts. All of the foregoing reports were entitled "In the matter of Herschel S. Green, Trustee of the Estates of James Green, deceased, and Martha Green, Deceased" and said reports were combined as to all of the said assets of the two estates and the expenditures therefrom.

The complaint in the District Court was filed on November 8, 1951. In this complaint the plaintiffs sought an accounting of Herschel, as to the estates of both James and Martha. Plaintiffs named in this suit were Oscar and his two children, Robert A. Green and Quentin L. Green, who

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were remaindermen under the wills of both James and Martha, and the defendants were Herschel, the trustee of both trusts, and his wife, Madge, who is a contingent life income beneficiary under the terms of the codicil of Martha.

The amended complaint filed on January 9, 1952, alleges that plaintiffs are residents and citizens of the State of Texas and that the defendants are residents and citizens of the County of Crawford, State of Illinois, and that the ground upon which the jurisdiction of the District Court depends is diversity of citizenship between the parties, the amount in controversy exceeding the sum of $3,000. It also alleges that Robert and Quentin, sons of Oscar, and Madge, wife of Herschel, are the only living, successive heirs, beneficiaries and remaindermen under the terms of the testamentary trusts set up by the will of James, and the will and codicil of Martha. It also charges Herschel with having exclusive possession of all of the farm lands in question and his wrongful refusal to furnish plaintiffs with correct information concerning the trust properties. It refers to the petition for accounting filed by Oscar in the Circuit Court of Crawford County and the filing of reports therein by Herschel. It charges that Herschel in said reports wrongfully combined his personal items with those of both trusts, making it impossible to determine the true total receipts or disbursements of either trust. It charges Herschel with fraudulent concealment of the true income of both trusts and with wrongfully transferring assets from the James trust to the Martha trust, as well as other misconduct.

The amended complaint demands that the District Court assume jurisdiction over all property belonging to the James trust and that an accounting be required of Herschel, who should be required by the court to "immediately restore" to the James trust all money found due from

Herschel together with interest thereon; that Herschel be removed as trustee under the James will and some other person appointed to succeed him; that the District Court determine what money Herschel has wrongfully paid to himself as co-beneficiary under the terms of the James and Martha trusts respectfully, and that the court award to Oscar his just portion thereof with interest. It also demands that Herschel be required to restore to the Martha trust any money or property lost thereto "by virtue of his fraudulent, illegal, and negligent conduct," and that judgment be entered personally against Herschel in favor of Oscar, for the amount which should have been distributed by Herschel as trustee under the will of Martha. It contains a general prayer for relief.

Madge is not mentioned in any part of the amended complaint or in the prayer for relief therein, except in the opening paragraph where it is recited that plaintiffs "complain of Herschel S. Green and Madge Green, defendants, * * *."

On December 17, 1951, the defendants filed a motion to dismiss the complaint or to stay all proceedings until the determination of the Crawford County case, which motion was later ordered to stand to the amended complaint. That motion is based on the contention that the District Court action and the Crawford County action are for identical relief and between substantially the same parties, that no relief can be obtained in the District Court that could not be obtained in the Circuit Court suit. Attached to the motion are copies of the pleadings and proceedings filed and entered in the Circuit Court case. On January 14, 1952, the District Court denied the motion.

On February 2, 1952, defendants filed an answer to the amended complaint, in which they say that Alice Green, the

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wife of Oscar, is now alive and has as much interest under said trust as the defendant Madge. The answer denies all misconduct charged against Herschel.

On the same day the defendants Madge individually, and Herschel, individually and as trustee under the James and Martha wills and as executor of the Martha estate, filed a counter-complaint praying for an order requiring Oscar to account relative to his acts in operating said estates, and to the said Herschel individually, and that a personal judgment be entered against Oscar and in favor of counter-complainants or Herschel as trustee or as executor of the estate of Martha deceased for any amounts appearing to be due from Oscar. Madge is not mentioned in the counter-complaint except as being identified with Herschel as a counter-complainant.

On February 20, 1952, the plaintiffs answered the counter-complaint, and on February 20, 1952, plaintiffs replied to the answer of the defendants, admitting that Alice, the wife of Oscar, is now alive, but denied that she has the same interest "under said trust as Madge inasmuch as Oscar now has two children living, whereas said Herschel is without lawful issue."

Following the taking of evidence in the District Court on October 27, 1952, Herschel tendered to that court his resignation as trustee under the James will and also as trustee under the Martha will and her codicil and agreeing that "if counsel cannot agree upon a successor trustee, the court shall appoint one in ten days." On the same day the court entered an order accepting the resignation and directing Herschel to make an accounting as trustee in said estates. On November 10, 1952, the court appointed Chauncey M. Rains as successor trustee in both trust estates.

On December 17, 1952, the court entered an order that Herschel make an accounting as trustee in the James and Martha estates within ten days. On March 16, 1953, the court entered an order upon the motion of Herschel granting him permission to file an amended account on or before April 16, 1953. On August 3, 1953, on a petition presented by Oscar, the court ordered Herschel to cease interfering with the supervision of the trustee appointed by the court and within 20 days deliver up possession of said trust property to said trustee and setting the case for trial on September 3, 1953.

On September 10, 1953, the defendants filed a motion "to dismiss the complaint as amended and to abate all further proceedings in this matter, and for certain injunctive relief." The grounds stated for the motion were the pendency of the Circuit Court case, the pendency of the estate of Martha in the County Court of Crawford County, and that Oscar had been guilty of laches in not filing objections to the reports filed in the Crawford County Circuit Court.

On December 5, 1953, Alice, wife of Oscar, made a motion requesting to be joined as a party plaintiff.

On December 9, 1953, defendants filed a second motion to dismiss and to abate proceedings and for certain injunctive relief. As grounds therefor they say: "That it appears from the allegations of paragraph 8 of the original complaint in this cause, and paragraph 8 of the amended complaint in this cause, that the Defendant Madge Green is joined in this suit merely for the reason that she is one of the living contingent beneficiaries under the testamentary trusts which are the subject matter of this suit. That there are no allegations in either the complaint or the amended complaint suggesting that Madge was a party to any of the alleged misconduct on the part of the Trus-

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tee, Herschel, and nowhere is any relief prayed against her on behalf of the plaintiffs in the present suit. That there are no allegations in the complaint or the amended complaint that said Madge refused to join as a party plaintiff in said suit and there are no allegations to show that her interest is any different than that of the other beneficiaries of the trusts which are the subject matter of this suit. That the real interest of the Defendant Madge is the same as that of the plaintiffs, who are the other beneficiaries under the trusts which are the subject matter of this suit. That the Defendant Madge is now and has been since the filing of this suit a resident and citizen of the State of Illinois. That the Defendant Herschel is now and has been since the filing of his suit a resident and citizen of the State of Illinois. That if the Defendant Madge is realigned as a party plaintiff according to her real interest in this suit, there would be a citizen of the State of Illinois as plaintiff and a citizen of the State of Illinois as the defendant. That the jurisdiction of this court is invoked on the grounds of diversity of citizenship and there is no diversity of citizenship in this suit if the present Defendant, Madge, is realigned as a party plaintiff according to her real interest. That the Defendants raised this ground for lack of jurisdiction on the part of this Court as an alternative and in addition to the grounds alleged in the motion to dismiss and to abate proceedings and for injunctive relief.'' The defendants asked the court to dismiss the proceedings in their entirety and abate any further action, discharge the trustee theretofore appointed and enjoin the trustee appointed by the Court from taking any further action in this matter.

On January 26, 1954, the aforesaid motion of the defendants was denied and the motion of Alice to become a

party plaintiff was allowed, she to be bound by all previous orders entered in the case.

On February 5, 1954, defendants filed a motion praying for an injunction pending an appeal to this court, restraining plaintiffs from further prosecution of the suit during the pendency of the appeal and also enjoining the successor trustee from managing in any way the trust property or disposing of same except as is reasonably necessary for its reservation, or in the alternative, that the plaintiffs be enjoined from further prosecuting the suit pending appeal by the defendants.

On February 8, 1954, a notice of appeal was filed by defendants appealing to this court from the order entered January 26, 1954, "wherein said court denied the amended motion to dismiss and to abate proceedings and for injunctive relief, and the supplementary or second motion to dismiss and to abate proceedings and for injunctive relief, and wherein said court granted the motion of Alice allowing her to enter her appearance in this cause to become a party-plaintiff * * *."

On the same day the court entered an order that because of the notice of appeal the court was without jurisdiction as to any stay or injunction as requested in their motion or stay or motion for injunction pending appeal. The court on February 10, 1954, approved and ordered filed a supersedeas bond tendered by defendants.

1. Defendants have appealed from an order which among other things denied their amended motion for an injunction restraining the successor trustee appointed by the District Court from acting as such, on the ground that the court was without jurisdiction of the case.

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Defendants' appeal from this interlocutory order is authorized by 28 U.S.C.A. § 1292, which reads, in part, as follows: "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, * * * refusing * * * injunctions, * * * ."

2. Both in the District Court and here defendants contend that the District Court has no jurisdiction of this case. That question this court may determine upon an interlocutory appeal.

A federal appellate court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a case under review. *Mitchell* v. *Maurer*, 293 U.S. 237, at 244.

In *Spring* v. *Ohio Oil Co.*, 108 F. 2d 560, the Ohio Oil Company brought suit against Spring to remove cloud on title, to quiet possession, and for interlocutory and final injunctions. From a judgment granting an interlocutory injunction, defendant appealed. The court said, at 561:

> "The case is not here on the merits and the sole question presented for decision is whether the District Judge abused his discretion in granting an interlocutory injunction. *Lea* v. *Vasco Products*, 5 Cir., 81 F. 2d 1011. Of course, in deciding that question we may consider whether the court was without jurisdiction."

In *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462, Humble Oil & Refining Co. brought an action against the Eighth Regional War Labor Board and others for a declaratory judgment with reference to the alleged illegality of a directive of the National War Labor Board and the respective rights of the parties and for injunctive relief. From an interlocutory order of the District Court, 56 F. Supp. 950, granting a preliminary injunction, defendants appealed. The Humble

Oil & Refining Co. contended that, since the appeal was from an order granting a temporary injunction, and the merits of the case had not been decided, the only issue before the court was whether the lower court abused its discretion in granting the preliminary injunction. But the court said at 464:

> "It is true that the nature of the appeal precludes a decision on the merits here, but the question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion. The question whether a court has abused its discretion necessarily involves the question whether a court has any discretion to abuse."

It is therefore our duty to proceed on the record before us to determine the question of jurisdiction.

3. The most serious challenge to the jurisdiction of the court is aimed at the contention of plaintiffs that there is a diversity of citizenship between the parties, the amended complaint alleging that plaintiffs are residents and citizens of Texas and that defendants are residents and citizens of Illinois. However, defendants maintain that Madge Green, named by plaintiffs as a defendant, should be realigned with the named plaintiffs, according to her real interest in the suit.

Section 2 of Article III of the United States constitution provides that the federal judicial power shall extend to cases arising between citizens of different states.

28 U.S.C.A. § 1332(a) provides in part:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between: (1) Citizens of different States; * * *"

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In making a determination as to whether diversity of citizenship exists in this case, we are first called upon to determine whether Madge Green is an indispensable party.

Madge Green, like Alice Green, has no legal or equitable interest in the trust established by James Green's will. Both of these women, however, are contingent remaindermen under the trust established by Martha Green's will and codicil. Each of them will, upon the death of her husband without any children surviving him, have a life estate in the income of the trust until she dies or remarries. Each of these women will be similarly affected by any decree determining what money, if any, Herschel has wrongfully paid to himself as co-beneficiary of the Martha trust, and ordering Herschel to restore to that trust any money or property lost thereto "by virtue of his fraudulent, illegal, and negligent conduct," (and necessarily fixing the amount to be restored), all as prayed by plaintiffs.

In the motion of Alice Green that she be permitted to join as a plaintiff in the amended complaint, she states that "she is a contingent remainderman and as such she ought to be a plaintiff in this suit if complete relief is to be accorded between the persons already parties." It is apparent that for the same reasons Madge was made a party to the suit. As contingent remaindermen they are indispensable parties to the suit. In *Baird v. People's Bank & Trust Co.*, 120 F. 2d 1001; 136 A.L.R. 693, the court said, at 1003:

> "For an absent party to be in the third class, that is, indispensable, he must of course have a direct interest in the litigation. If this interest is such that it cannot be separated from that of the parties to the suit; if the court cannot render justice between the parties in his absence, if the decree will have an injurious effect upon his interest; or if the final determination of the controversy in his absence will be

inconsistent with equity and good conscience, he is an indispensable party. *State of Washington* v. *United States*, 9 Cir., 87 F. 2d 421. In our opinion the interest of the remaindermen is direct, distinct and non-severable.

The portion of the complaint with which we are concerned relates to the administration by the trustees of the corpus of the trust. The relief sought is that certain specific investments, alleged to have been illegally made, be replaced with cash. The interest of the remaindermen in the corpus and in the specific investments is just as direct as that of the life tenants. *Talbutt* v. *Security Trust Co.*, D. C. 22 F. Supp. 241; *Franz* v. *Buder*, 8 Cir., 11 F. 2d 854. Since it is a succeeding interest it is not severable as an undivided present interest might be. It is obviously impossible to make a complete physical division of a trust fund between life tenants and remaindermen. But both are entitled to compel proper action with respect to the securities comprising the corpus of the trust. If they are permitted to resort to different courts for such relief inconsistent orders with respect to the same securities might well make orderly administration of the trust impossible.

It necessarily follows that the presence of the remaindermen is indispensable in an action by life tenants relating to the corpus of the trust fund."

This conclusion is supported by what we said in *In Re National Realty Trust*, 167 F. 2d 440, at 443 (italics supplied):

"A more serious question is whether the court could exercise such power without notice to the certificate holders and without according them an opportunity to be heard. It is the generally established rule in Illinois, *and we think elsewhere*, that in all actions concerning trust property the beneficiaries are necessary parties. *Illinois National Bank of Springfield* v. *Gwinn*, 390 Ill. 345, 61 N.E. 2d 249, 159 A.L.R. 468; *People's Bank & Trust Co. of Rockford v. Gregory*, 347 Ill. 397, 398, 399, 179 N.E. 856; *Martin* v. *Frank*, 259 Ill. App. 417, 424."

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Under Illinois law a "necessary party" is an "indispensable party." See *Jones* v. *Bryant* (a case involving a testamentary trust), 204 Ill. App. 609, where, at 617, the court said:

> "Parties to actions are divided into necessary or indispensable parties, and proper but not indispensable parties. Necessary parties are those without whom the court will not proceed to a decree even as to the parties before it. '* * * Accordingly, persons whose interests will necessarily be affected by any decree that may be rendered are necessary and indispensable parties.' "

It is inherent in plaintiffs' argument in this court that Madge is a contingent beneficiary in the Martha trust and has a real interest in this case. They say in their brief:

> "By Herschel's negligently and illegally commingling the assets of the two trust estates, Defendant Madge Green will wrongfully gain at the expense of the beneficiaries of the James Allen Green trust estate, should the contingent interests become vested. The defendants now seek to have ratified the wrongful acts of Defendant Herschel S. Green whereby, as trustee he caused the Martha Green trust to be unduly enriched to the undoubted advantage of his wife."

Indeed, in this court plaintiffs have never contended either that a contingent remainderman in a testamentary trust, or Madge Green specifically, is not an indispensable party. Plaintiffs, in their brief, in attempting to show that this case should take precedence over the suit filed in the state court by Oscar against Herschel, as trustee, point out that in the federal case "ALL beneficiaries and remaindermen of both aforesaid trust estates are parties," whereas they say that "the State court cannot obtain the *necessary* jurisdiction of such non-resident beneficiaries unless" they "voluntarily submit themselves to its jurisdiction." This argument shows that plaintiffs themselves believe that all

beneficiaries in both trusts, including Madge, are indispensable parties.

In *Talbutt* v. *Security Trust Co.*, 22 F. Supp. 241, plaintiff sought to compel a defendant trustee to restore a portion of the corpus of the trust estate claimed to have been lost because of the derelictions of the trustee. The court said:

> "The plaintiff, as life tenant, does not completely own the right here sought to be adjudicated. The claim which she asserts is one which affects all interests inherent in the corpus of the estate. The interests of the life tenant and the remaindermen in respect to the corpus of the trust estate are so united and bound together that they seem clearly inseverable, and an adjudication of questions affecting the right of the trustee to be absolved from responsibility for the restoration of the corpus of the estate would necessarily have a direct effect on the interests of both, and can only be had in a proceeding to which both the life tenant and the remaindermen or such of the contingent remaindermen as are in being, are parties. *Shields* v. *Barrow*, 17 How. 130, 15 L. Ed. 158; *Gregory* v. *Stetson*, 133 U.S. 579, 10 S.Ct. 422, 33 L.Ed. 792; *Commonwealth Trust Co.* v. *Smith*, 266 U.S. 152, 45 S.Ct. 26, 69 L.Ed. 219; *Franz* v. *Buder*, 8 Cir., 11 F. 2d 854."

At 242, the court added:

> "That the joinder of the plaintiff's brothers will oust the court of jurisdiction does not authorize the court to proceed in their absence, if they are indispensable parties. *Shields* v. *Barrow, supra.* The plaintiff is not deprived of a remedy, but is merely relegated to the jurisdiction of the state court before which all persons may be brought who are interested in the subject-matter of the litigation, either legally or beneficially, and wherein an effective and just determination of the questions involved may be had which will be final and binding upon all parties in interest."

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It is true that if Madge is not an indispensable party, the jurisdictional defect might be cured by dismissing the amended complaint as to her, but, since she is an indispensable party, the defect is incurable. *Minnis* v. *Southern Pacific Co.*, 98 F. 2d 913, at 915.

Upon a proper realignment of the parties, Madge, a citizen of Illinois, is a plaintiff, together with the named plaintiffs, who are citizens of Texas. The sole defendant is Herschel, a citizen of Illinois. Under this realignment, there is a citizen of Illinois among the plaintiffs and a citizen of Illinois is the sole defendant. This non-diversity of citizenship deprives the District Court of jurisdiction of the case. In *Indianapolis* v. *Chase National Bank*, 314 U.S. 63, at 69, the court said:

> "To sustain diversity jurisdiction there must exist an 'actual,' *Helm* v. *Zarecor*, 222 U.S. 32, 36, 'substantial,' *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss*, 3 Cranch 267."

Stated in another way the rule is that where federal jurisdiction rests on diversity of citizenship the diversity must be complete, and to see whether it is, all parties will be aligned as plaintiffs or defendants according to their real interests, *Hudson* v. *Newell*, 172 F. 2d 848, at 850, even though such an alignment may destroy the necessary diversity of citizenship and result in a loss of jurisdiction. *Kentucky Natural Gas Corp.* v. *Duggins*, 165 F. 2d 1011, at 1015.

The omission from the amended complaint of any prayer for relief against Madge, who is named as a defendant thereto, is significant. It tends to show that she is prop-

erly to be treated as a plaintiff. *Steele* v. *Culver,* 211 U.S. 26, 29.

The fact that the defendant Madge is the wife of the defendant Herschel is irrelevant. Her interest in the Martha Green trust is the basis for joining her as a party. That she may have a sympathetic interest in her husband's defense in this case or that his estate upon his death might be larger due to his alleged misconduct as trustee, from which increment she might benefit as his widow at his death, if she should survive him and was up until his death still his wife, does not constitute such an interest as would be determinative on the question of realignment of the parties herein.

In holding that there was diversity of citizenship in this case, the District Court relied on *Venner* v. *Great Northern R. Co.,* 209 U.S. 24, and *Hodgmen* v. *Atlantic Refining Co.,* 274 Fed. 104. These were both stockholders' suits. In the *Venner* case the plaintiff stockholder by his complaint alleged that both the railroad and its president were engaged in the same illegal and fraudulent conduct. The court said, at 32:

> "They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant."

In the instant case there is no allegation that Madge participated in any of the alleged misconduct of the trustee.

In the *Hodgman* case it was held that if the corporation is under a control antagonistic to the plaintiff and caused to act in a way detrimental to his rights, then a

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controversy arises which may be litigated in a federal court. The situation there is not analagous to that in the case at bar. See, also, 35 C.J.S. 885.

4. Jurisdiction cannot be bestowed even by agreement of the parties, nor can want of jurisdiction because of non-diversity of citizenship be waived by the parties. *Mitchell* v. *Maurer,* 293 U.S. 237, at 293.

In *Page* v. *Wright,* 116 F. 2d 449, at 453, this court said:

> "From the authorities referred to, the conclusion seems inescapable that the duty devolves upon the court 'at any time' the jurisdictional question is presented to proceed no further until that question is determined. It can not be conferred by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise, and a party can not be precluded from raising the question by any form of laches, waiver or estoppel. So, in the instant case, if the parties jointly or singly had consented or agreed to jurisdiction, it would have been of no avail in face of the fact that the question was forcibly and directly called to the attention of the court. The answer of the defendant conceding jurisdiction amounted to no more than consent, and as seen, jurisdiction can not be thus conferred irrespective of whether the consent was the result of an honest mistake or otherwise."

Therefore the contention of the plaintiffs that the mere naming of Madge in the answer filed to the amended complaint and her being named as a counter-plaintiff with Herschel in a counterclaim, in which no allegations are made in regard to her and in which she asks for no relief, amounted to a waiver of lack of jurisdiction by the court, cannot be sustained. Neither was the tardiness of the defendants in raising the question of want of jurisdiction of the court sufficient to bestow jurisdiction.

In *Spencer* v. *Patey*, 243 Fed. 555, at 556, the court said:

> "In short, if the court has no jurisdiction it cannot proceed, and when this appears, whether in the trial court or the appellate court, there is no alternative but to decline to entertain the cause. This being the law, we turn to the record and find a controversy of which the District Court has no jurisdiction upon the allegations or the proofs.
>
> * * * * *
>
> We think the judgment should be reversed with costs and the cause remanded to the District Court with instructions to dismiss the complaint without prejudice."

In *Calcote* v. *Texas Pacific Coal & Oil Co.*, 157 F. 2d 216, at 218, the court said:

> "In diversity cases, the question of indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action. Jurisdictional questions come first in the orderly disposition of a case. A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained."

5. In my opinion the District Court never had jurisdiction to enter any order in this case except an order dismissing the case for want of jurisdiction at plaintiffs' costs, and it should be remanded to the District Court for that sole purpose.

However, my two colleagues disagree with me in my conclusion as to a lack of diversity of citizenship and my views thereon are not the views of the court.

6. The second challenge of defendants to the jurisdiction of the District Court is based upon their contention that prior exclusive jurisdiction is vested in the circuit court of Crawford county, Illinois, wherein Oscar's accounting suit is pending. Defendants admit that the cir-

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cuit court proceeding was filed only in regard to the trust estate of Martha Green, but claim such proceeding, in fact, also involves the trust estate of James Green. They argue that thereby the circuit court acquired prior exclusive jurisdiction of both trust estates. The scope of that proceeding is defined by the petition for accounting which Oscar filed in that court. It refers in no way to the James trust. The scope of the proceeding was not enlarged by the acts of Herschel in filing a series of reports in the circuit court in which he combined the two trust estates and also his own personal income and expenditures. The relief prayed by Oscar in his petition was in reference to only the Martha trust. No relief beyond the scope of the petition could be granted in that proceeding. Herschel did not enlarge the scope of that case by bringing in the James trust by counterclaim or otherwise.

It appears that on October 20, 1951, Oscar filed a motion in the circuit court to dismiss his petition. While this motion has never been presented to the court for a ruling, its filing negatives any present intention by Oscar to pursue that case further.

The petition in the circuit court is on behalf of Oscar and directed against Herschel only. It is a proceeding *in personam*. The court was not asked or required to take control of the *res* of the Martha trust for any purpose whatsoever. It is not a proceeding *in rem*.

The subject matter of the District Court action is different. It involves *both* trusts. It is proceeding *in rem*, as to the James trust, in which the court has control of the trust *res* and has before it all of the beneficiaries and remaindermen. As to the Martha trust, plaintiffs maintain that the District Court proceeding is *in personam* on the theory that they do not ask that court to assume posses-

sion or control of that trust, but merely ask it to require Herschel to pay to Oscar the latter's just portion thereof.

It thus appears that the subject matter of the suits in the circuit court and in the District Court is not the same and that the same persons are not parties in both proceedings. The District Court is the first and only court which has acquired jurisdiction of all interested parties. The District Court is the first and only court which has acquired jurisdiction over the James trust. In addition, it has acquired jurisdiction over the Martha trust. Whether or not its jurisdiction over the Martha trust has become a proceeding *in rem*, by virtue of Herschel's submitting to that court his resignation as trustee thereof and its appointment of a successor trustee, is not necessary for us to decide.

We hold that, inasmuch as the circuit court does not have jurisdiction of all interested parties and has jurisdiction of only a part of the subject matter, the District Court's jurisdiction is not stayed and that that court has a right to proceed with the case pending before it.

7. Defendants also contend that the District Court has no right to entertain the present suit for accounting because it would interfere with the jurisdiction of the county court of Crawford county, wherein the estate of Martha Green is still being administered and wherein Herschel is acting as executor of her will.

County courts, in exercising probate jurisdiction, have no power in Illinois as to the management of trust estates. *Brinkerhoff* v. *Huntley*, 223 Ill. App. 591, 605. Such a court is not a court of general jurisdiction. *Howard* v. *Swift*, 356 Ill. 80, 84. The administration of testamentary trusts constitutes a well established branch of equity jurisdiction, and is in no sense a "probate matter" such as is contem-

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plated by the provisions of the Illinois constitution relating to probate courts. *Frackleton* v. *Masters,* 249 Ill. 30; *Huston* v. *Weed,* 242, Ill. App. 495.

We, therefore, hold that the pendency of the Martha Green estate in the county court is no bar to the present action in the District Court.

For the latter reasons and those of Judge Major, this court holds that the District Court has jurisdiction of this cause and its order of January 26, 1954 is

AFFIRMED.

MAJOR, *Circuit Judge.* Chief Judge Duffy and I agree with Judge Schnackenberg in an affirmance of the order appealed from. We disagree with his view that the District Court was without jurisdiction under 28 U.S.C.A. § 1332 (a). The fact is that defendants' challenge to diversity jurisdiction was the last maneuver in the case, made for the first time more than two years after the complaint was filed and then only after the court had rendered its decree requiring an accounting by the defendants. And we think it not unfair to the District Judge or counsel for the respective parties to state that apparently the issue was regarded as of such minor consequence that little consideration was given it in the District Court, and it is evident from the breifs filed in this court that counsel regarded it as of minor importance. In defendants' brief, it is the last point argued. Defendants blow hot and cold on the issue as to the real parties in interest. As late as September 10, 1953, in their amended motion to dismiss the complaint on the ground that the District Court should not proceed because the State Court had acquired jurisdiction of the same cause of action and all necessary parties, it was alleged, "* * they [referring to all parties other than Oscar and Herschel] are not real parties in interest and are not neces-

sary to the final determination of the issues involved at the present time * *." And in the same motion Oscar was alleged as "the real party Plaintiff and real party in interest." Contrary to that position, defendants now assert in rather feeble fashion that all the parties, including Alice and Madge, are indispensable.

Judge Schnackenberg has made a fair statement of the facts, which we shall not repeat. In our judgment, Madge is not an indispensable party but, assuming *arguendo* that she is, both reason and authority make it plain that she should not be realigned as a party plaintiff. It is asserted that Madge is in the same position as Alice as to indispensability. It is pertinent to point out, however, that when Alice sought leave to intervene, she did so under the provisions of Rule 19 (b) of the Federal Rules of Civil Procedure, upon the express representation that she was not an indispensable party. It also may be pertinent to note that while the contingent interest of both Alice and Madge stems from the codicil to the will of Martha Green, they have no joint interest or a contingent interest in a joint fund. The interest of Madge is only in that portion of the trust income payable to her husband, Herschel, and is contingent upon his prior death without children (they have no children). On the other hand, the interest of Alice is only in that portion of the income payable to her husband, Oscar, and is contingent upon his prior death without children (they have two children). Therefore, Madge has no interest contingent or otherwise in the income payable to Oscar, and Alice has no interest contingent or otherwise in the income payable to Herschel.

As shown by Judge Schnackenberg, the principal relief sought by plaintiffs was an accounting for the money alleged to have been wrongfully converted by Herschel as trustee, both from the James and the Martha trusts, and

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for his removal as trustee and the appointment of a successor-trustee. A personal judgment was sought against Herschel in favor of Oscar for the latter's share of the earned income of the two trusts and for a restoration of corpus. It is evident that none of the contingent beneficiaries had an interest in any recovery obtained by Oscar. The most that can be said is that Madge, as well as Alice, had an interest in requiring restoration to the corpus of the Martha trust of any money or property wrongfully converted therefrom by Herschel, only on the basis that the increased worth of that trust would provide more income to them when and if the contingency arose by which they were to receive income, that is, the death of their respective husbands.

It would unduly prolong this discussion to cite or discuss the many cases which have been called to our attention. It is a fundamental principle that a party is not indispensable where a decree can be rendered between the parties actually before the court without prejudicially, adversely or injuriously affecting an absent party. In *Bordieu* v. *Pacific Western Oil Co. et al.*, 299 U.S. 65, 70, the court stated:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. [Citing cases.]"

In *Waterman* v. *The Canal-Louisiana Bank & Trust Co., Executor*, 215 U.S. 33, 49, the court stated:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party."

In *Cather* v. *Ocean Accident & Guaranty Corp.*, 94 F. Supp. 511, 515, the court stated:

> "Generally, a reliable test of one's indispensability as a party to an action is whether he will be adversely or prejudicially affected by a proper and complete judgment in it. If he will be, he is indispensable. [Citing cases.] And that consequence is not obviated by the circumstance that in his absence the judgment will not be technically binding upon him."

Many other courts have announced the same rule. See *Horn* v. *Lockhart et al.*, 84 U.S. 570, 579; *Seeley et al.* v. *Cornell et al.*, 74 F. 2d 353, 355; *State of Washington* v. *United States et al.*, 87 F. 2d 421, 427, *and Chance* v. *Buxton*, 170 F. 2d 187, 188.

Baird v. *People's Bank & Trust Co.*, 120 F. 2d 1001, the case most strongly relied upon by Judge Schnackenberg, recognizes this principle, as is shown by his quote. As heretofore noted, it seems too plain for argument that neither Madge nor Alice could have any interest in any recovery obtained by Oscar, the primary purpose of the suit, it is equally plain that they have no interest in any restoration which Herschel is required to make to the James trust. While they have a remote contingent interest in the Martha trust, it appears that they cannot be adversely or prejudicially affected by any restoration which Herschel is required to make to that trust. On that score their contingent interest would be enhanced, not injured.

In Re National Realty Trust, 167 F. 2d 440, relied upon and quoted from by Judge Schnackenberg, furnishes little if any support to his position. There we held that certificate holders were entitled to notice of an election of a trustee in a common law trust. We thought their situation was comparable to the right of directors of a corporation to notice for the election of corporate officials. Even so,

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we did not hold that they were indispensable parties, but only necessary. The proceeding was under the Bankruptcy Act, where the Federal Rules of Civil Procedure are not controlling (Rule 81 (a)). More than that, this court has twice held that the indispensability of parties must be determined by Federal and not State rules. *De Korwin* v. *First National Bank of Chicago et al.*, 156 F.2d 858, 860, and *Cowling* v. *Deep Vein Coal Co., Inc.*, 183 F.2d 652, 655. And in this connection see Rule 19 (a) and (b).

Neither do we think that the effort to remove Herschel as trustee of the two estates made Madge (or any other contingent beneficiary) an indispensable party. In *Wesson et al. v. Crain*, 165 F.2d. 6, 9, the court stated:

> "We agree with the Supreme Court of Massachusetts that one of several beneficiaries may have a trustee removed if he has so misconducted himself that he ought to be removed."

In *Sadler* v. *Sadler*, 167 F.2d. 1, 2, the court stated:

> "The interests of the beneficiaries are not joint. That one or more beneficiaries may have a trust declared in his or their favor as well as in favor of persons not parties does not make the absent persons indispensable or even necessary parties."

As heretofore noted, the interest of the beneficiaries in the instant situation is not joint. Moreover, any interest which Alice might have had regarding the removal of Herschel as trustee has been eliminated by her own voluntary act in entering a written consent to Herschel's resignation as trustee on October 27, 1952, with an agreement for the appointment of a successor-trustee.

Alice not being an indispensable party, the complaint might be dismissed as to her (*Minnis* v. *Southern Pacific Co.*, 98 F.2d 913, 915), or her presence in the suit need

not be considered (*Salem Trust Co.* v. *Manufacturers' Finance Co. et al.*, 264 U.S. 182, 190).

Assuming, however, contrary to what we think, that Madge is an indispensable party, we do not believe that she should be realigned as a plaintiff. We think that on this phase of the situation Judge Schnackenberg has placed too much reliance upon what appears only from the complaint (with the codicil attached to Martha's will) and not enough to subsequent pleadings and proceedings in the case, as well as the attitude and conduct of Madge toward the controversy. *Steele* v. *Culver*, 211 U.S. 26, 29, is cited in support of the statement that it is significant that no relief was prayed against Madge. That is true, of course, but it is of far greater significance that Madge by answer joined her husband, Herschel, in denying each and every alleged act of wrongdoing on his part, as alleged in the complaint, and prayed for its dismissal. Thus we have a situation where the plaintiffs have stated and seek to go forward with a cause of action against Herschel, while Madge has joined Herschel in an effort to erect an insurmountable blockade and to defeat the action at its threshold. More than that, Madge joined Herschel in a counterclaim charging Oscar with wrongdoing and seeking relief against him. Furthermore, in an amended motion to dismiss and abate proceedings, filed September 10, 1953, Madge joined her husband in a request that the successor-trustee theretofore appointed by the court with the express approval of both Herschel and Madge be discharged and that such trustee be enjoined from taking any further action in either of the testamentary trusts.

As a matter of common sense, it appears well near preposterous to think that Madge, with her attitude and conduct toward the litigation, should be aligned as a plaintiff. Aligned for what purpose? Such action could not be

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expected to do other than impair, certainly not aid, an adjudication of the rights and interests of the parties. Its realistic effect would be like tossing a new-born lamb into the lap of a tiger for safekeeping.

We need not burden our views by the citation or discussion of more than a few of the many cases bearing upon the issue of realignment of parties. We make bold to state, however, that there is no case which has required the realignment of a party under the circumstances before us. In *Venner* v. *Great Northern Railway Company*, 209 U.S. 24, 31, the court stated that parties should be realigned "upon the side where their interest in and attitude to the controversy really places them." In *Hamer et al* v. *New York Railways Company et al.*, 244 U.S. 266, the court held that defendant should be realigned as plaintiff because such defendant by answer admitted the allegations of the complaint and joined in the prayer for relief. Thus the court treated as determinative the defendant's attitude toward the litigation. In *Sutton et al.* v. *English et al.*, 246 U.S. 199, the court reversed the District Court which had realigned as plaintiff a party named as defendant. In doing so, it stated (page 204):

> "Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy."

In *Indianapolis et al.* v. *Chase National Bank, Trustee, et al.*, 314 U.S. 63, which is perhaps as strong a case in favor of realignment as can be found, the court stated (page 69):

> "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'"

It is not open to question but that Madge joined her husband, Herschel, on his side of the controversy and has assumed an uncomprising attitude of hostility toward the plaintiffs and their maintenance of the suit. Under such circumstances, this court should permit her to remain on the side where she and her counsel for more than two years thought she belonged.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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